In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 211

DETROIT VITAL FOODS, INC., LELORD KORDEL AND ALFRED FELDTEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners Kordel and Feldten and their corporate employer, Detroit Vital Foods, Inc., were convicted on five counts of an indictment charging them with introducing into interstate commerce certain misbranded drugs and with performing acts with reference to another drug which resulted in its misbranding while it was being held for sale after shipment in interstate commerce (21 U.S.C. 331(a), (k)). Kordel (a prior offender under 21 U.S.C. 331) was sentenced to imprisonment for two years subject to the parole

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eligibility provisions of 18 U.S.C. 4208(a)(2) and was fined $10,000; Feldten was sentenced to imprisonment for one year, suspended to thirty days with three years' probation, and was fined $2,000; the corporation was fined $5,000. The court of appeals reversed the convictions of the individual petitioners on the ground that they had been denied the protection afforded by the Fifth Amendment because of the government's utilization of simultaneous civil and criminal proceedings in enforcing the food and drug law. It affirmed the conviction of Detroit Vital Foods, Inc., finding that the corporation could not assert the Fifth Amendment privilege against self-incrimination. 407 F. 2d 570. This Court denied a petition for certiorari filed by the corporation (395 U.S. 935), but granted the government's petition as to Kordel and Feldten limited to the questions raised by the parallel use of civil and criminal proceedings. 395 U.S. 932. Subsequently this Court reversed the judgment of the court of appeals and remanded the case to that court for further proceedings consistent with this Court's opinion. *United States* v. *Kordel*, 397 U.S. 1.

The previous opinion of the court of appeals, although affirming the conviction of the corporation, confined its discussion to the issues presented by the parallel enforcement of civil and criminal sanctions. 407 F. 2d at 572. On remand, petitioners filed motions to have the court consider the other grounds of asserted error relied on by them which had not been resolved in the prior opinion. The court below, "[u]pon consideration, [found] those grounds to be without merit" (Pet. App. A7–A8).

1. As petitioners note, two of the issues they presently raise—whether the indictment was invalid because of the alleged absence of any persuasive evidence before the grand jury, and whether tape recordings of petitioner Kordel's public lectures were obtained in violation of the Fourth Amendment—were previously urged in the petition for certiorari filed on behalf of Detroit Vital Foods, Inc., which this Court denied. As to those issues we rely on the discussion in our prior brief in opposition, No. 1285, O.T., 1968.

2. Petitioners also contend (Pet. Question I(b)) that the failure of the grand jury to take minutes of testimony requires reversal of their convictions. A review of petitioners' briefs in the court of appeals discloses that this issue was not relied on by petitioners prior to the remand. In any event, as petitioners recognize (Pet. 13), the Rules of Criminal Procedure do not require the recording of grand jury minutes and no court has held that recording is constitutionally required. See *Baker* v. *United States*, 412 F. 2d 1069, 1073 (C.A. 5), certiorari denied, 396 U.S. 1018; *Loux* v. *United States*, 389 F. 2d 911, 916 (C.A. 9), certiorari denied, 393 U.S. 867; *Wyatt* v. *United States*, 388 F. 2d 395, 396–397 (C.A. 10); *Schlinsky* v. *United States*, 379 F. 2d 735, 740 (C.A. 1), certiorari denied, 389 U.S. 920; *United States* v. *Hensley*, 374 F. 2d 341, 352 (C.A. 6), certiorari denied, 388 U.S. 923; *United States* v. *Caruso*, 358 F. 2d 184, 186 (C.A. 2), certiorari denied, 385 U.S. 862; see, also, *United States* v. *Napue*, 401 F. 2d 107, 112–113 (C.A. 7), certiorari denied, 393 U.S. 1024.

3. Petitioners contend that the trial judge erred in giving an aiding and abetting instruction under 18 U.S.C. 2(a). While acknowledging that normally one charged with a substantive offense may properly be convicted as an aider and abettor (see *Jin Fuey Moy* v. *United States*, 254 U.S. 189), petitioners urge that the rule should not apply where, as here (*United States* v. *Dotterweich*, 320 U.S. 277), the offenses charged do not require wilfulness or bad intent. They read the language of this Court in *Nye & Nissen* v. *United States*, 336 U.S. 613, 620, to the effect that an aider and abettor must "consciously" share in a criminal act, to mean that an aider and abettor must always have a specific intent to violate a known law. The fact that one must act consciously does not mean that there must be a finding of specific intent. Where the substantive offense contains no element of wilfulness, one may aid and abet such offense if he merely intends to assist the principal to do the forbidden act. See *United States* v. *Dotterweich*, *supra*, 320 U.S. at 284–285.

4. The essence of the criminal charges against petitioners was that, as to some of the products, certain books and leaflets written by Kordel constituted part of the labeling and contained false statements and that, as to all counts on which petitioners were convicted, the products (which were claimed by petitioners to be merely food supplements) were in fact intended by them to be used for the prevention and treatment of various conditions and diseases; that they were, therefore, drugs, the labeling of which was deficient in that

it failed to set forth adequate directions for use. The government proved Kordel's representations about the drugs principally by introducing tape recordings of his public lectures.

Petitioners urge that the trial judge erred in refusing their requested instruction that if the jury found that the products were intended to affect the structure and function of the body they were foods and not drugs; instead the court charged that a product may be *both* a food and a drug if it is offered for the cure, mitigation, treatment or prevention of disease. The instruction given was correct. The intended use of a product determines whether or not it is a drug under 21 U.S.C. (Supp. V) 321(g)(1). *E.g., United States* v. *Article * * * Consisting of 216 Cartoned Bottles * * * Sudden Change*, 409 F. 2d 734, 739 (C.A. 2) and cases cited; cf. *United States* v. *Bacto-Unidisk*, 394 U.S. 784.

5. Petitioners also contend that the trial judge erred in admitting evidence as to the falsity of representations made by Kordel during his public lectures. Petitioners do not deny that oral statements may constitute proof of the intended use of a product. As shown above, such intended use may determine whether the product is a drug within the meaning of 21 U.S.C. 321(g)(1). *Nature Food Centres, Inc.* v. *United States*, 310 F. 2d 67 (C.A. 1), certiorari denied, 371 U.S. 968; *V. E. Irons* v. *United States*, 244 F. 2d 34 (C.A. 1), certiorari denied, 354 U.S. 923; *United States* v. *Hohensee*, 243 F. 2d 367 (C.A. 3), certiorari denied, 353 U.S. 976. Thus the government was properly permitted to introduce Kordel's public representations

about the products on the issue of petitioners' intended use. In the context of this case, where the lectures were sprinkled with many disclaimers to the effect that the products were dietary supplements, it was important to present the entire setting in which Kordel offered these products, including the falsity of the disclaimers. For example, as to one product, Nutri-Time, Kordel's words implied that the drug was offered as a dietary supplement to replace in the body those minerals which are "sponged up" by white sugar. But the fact is that white sugar does not "sponge up" materials. The trial judge therefore did not abuse his discretion in permitting the government to introduce proof of the misrepresentation for its bearing on the purpose for which Kordel was offering the product at the time. See *Research Laboratories, Inc.* v. *United States*, 167 F. 2d 410, 420 (C.A. 9), certiorari denied, 335 U.S. 843.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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